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No. 84-1322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD G. NILL,
Petitioner,

v.

ESSEX GROUP, INC. and INDIANA BANK AND TRUST COMPANY OF FORT WAYNE,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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21 pp

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Rule 28.1 Disclosure

Essex Group, Inc. is a wholly owned subsidiary of United Technologies & in addition is affiliated with the following companies: Diamond Wire & Cable Co., B-K Office Equip. Co., E.W. Bohren Transport, Inc., Transport Motor Express, Inc., Essex Isola, Inc., Essex Int'l. Isola, Inc.

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I.

SUMMARY OF ARGUMENT

Mr. Nill's Petition for Certiorari presents only two issues. First, did the Indiana Trial Court and the Court of Appeals have jurisdiction pursuant to 29 U.S.C. 1132, *et seq.* to hear and resolve the claims brought by Mr. Nill, a beneficiary of the Essex Trust. Second, assuming jurisdiction, did the Indiana Court of Appeals properly interpret the meaning of the Trust.

It is clear from the Record that the present controversy springs from a civil action instituted by Nill when Nill filed a denominated "answer and counterclaim" against the Bank trustee; Indiana state law expressly allows for a "civil action" to be commenced in such a manner. Accordingly, Nill, a beneficiary, correctly brought his ERISA-based claims in State Court.

Further, the potential ERISA-based jurisdictional question was never raised by petitioner below. In fact, petitioner defended vigorously the Trial Court's exercise of jurisdiction in supporting its Order in the Indiana Court of Appeals. Nill's jurisdictional arguments have been waived.

Finally, Nill presents no substantial federal question apart from his belated jurisdictional challenges. Simply, he continues to argue that the express Plan language was misinterpreted by the Court to which he, himself, had chosen to submit his case. Resolution of the meaning of Plan language in this case depends upon the application of ordinary canons of trust and contract interpretation and not on the application or creation of a positive federal rule. Further, the case is a poor candidate for certiorari in view of the limited number of parties affected. The correct interpretation of the Essex Plan would not create rights or obligations of universal application.

The Indiana Court of Appeals correctly interpreted the Essex Plan.

II.

ARGUMENT

1. The Court below properly had jurisdiction of the claims of petitioner.

Petitioner Nill was a beneficiary of an employee benefit plan sponsored by Essex; the proceedings below were initiated by the Plan Trustee, Indiana Bank and Trust Company, plaintiff. The Bank sought a declaratory judgment respecting its liabilities in the face of a mounting controversy flaring between Nill and Nill's former employer, Essex. Nill's Petition, however, does not stem from the civil action commenced by the Bank. Nill commenced his own civil action by filing a counterclaim against the Plan Sponsor, Essex. In Indiana, a "civil action" is commenced by "filing a complaint with the court or such equivalent pleading or document as may be specified by statute." Indiana Rules of Trial Procedure, T.R. 3. The Federal Statute, 29 U.S.C. 1132(e)(1) accorded Mr. Nill the privilege of bringing his civil action either in State Court or in Federal District Court. Mr. Nill submitted his case to the jurisdiction of the Indiana state courts when he commenced a "civil action" under the Indiana Trial Rules by filing his counterclaim. Nill's counsel stipulated the existence of jurisdiction to the Indiana Court of Appeals and the stipulation is memorialized in the Order issued by the Court of Appeals following the Pre-Appeal Conference [Pet., p. 20a].

While the question whether the Indiana trial court had jurisdiction over the "claims" of the Bank is academically interesting, it is not dispositive of the Petition or properly before the Court. So long as the

jurisdiction of the trial court over the parties litigant is unquestioned, each party litigant had the right to bring all claims which they possessed before the court for adjudication. Thus, Nill had the unquestioned right to bring his federal ERISA-based claims in state court. And, he had this right without respect of whether or not the state court had subject matter jurisdiction, in the final analysis, over the Bank's claims, or over Essex's claims. He chose to do so, basing his denominated "affirmative defense and counterclaim" on two theories. One of those theories—that the Plan mandated distribution of sums accumulated in his "auxiliary account" to him—was the subject of a favorable ruling when the Superior Court of Allen County, Indiana granted Nill partial summary judgment. (A copy of Nill's Answer forms an appendix to this Brief.) Accordingly, Nill subtly misstates the Record when he asserts that "this action was brought by Bank, as Trustee of the pension plan . . ." (Pet., at 9). It was not. The "action" forming the basis of the Petition, was brought by Nill. It was brought by him in the form of a countercalim; and, it was properly brought in state court.

2. Petitioner has waived his ERISA-based jurisdictional arguments by failing to raise them below.

In order to obtain review of a state court decision in the Supreme Court pursuant to 28 U.S.C.S. § 1257, it must affirmatively appear from the record that a substantial federal question was presented to the state court and was passed upon by that court. *Webb* v. *Webb,* 451 U.S. 493 (1981). The proceedings giving rise to the Petition were triggered when Nill filed his counterclaim in a declaratory judgment action brought

by the Bank-trustee. Throughout the pendency of this litigation Nill has strenuously argued that he was entitled to money held in trust by the Bank. In fact, Nill convinced the judge of the Indiana state trial court that his assertion was correct. As a result, the trial court entered a partial summary judgment in Nill's favor. That judgment was rendered on Nill's counterclaim. Nill did not complain to the trial court that there was no jurisdiction over this counterclaim. Nill did not complain to the Indiana Court of Appeals that there was no jurisdiction over his claim. Nor did Nill raise the issue in the Supreme Court of Indiana. Nill's suggestion that "the Supreme Court of Indiana should have granted transfer on appeal and remanded the case to the trial court to be dismissed for lack of jurisdiction," (Pet., at 9) and the reasoning upon which the assertion is grounded appear for the first time on Petition to this Court.

In review of the Petition, the Court will note a studied avoidance with compliance under its Rule 21.1 (h), inasmuch as nowhere does Petitioner identify at which stage of the proceedings below the federal jurisdictional question was raised. Nill did not comply because he cannot comply.

This Court has noted:

> "that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below."

Webb v. *Webb*, 451 U.S. 493 at 500. While there may be cases which, on their facts, might imply a relaxation of the application of the foregoing rule, this is not such a case; here, in fact, the petitioner invoked the jurisdiction which he now seeks to challenge for the first time on certiorari.

3. The decision below was correct and presents no substantial question meriting certiorari.

ERISA was drafted in a manner to encourage the creation of a limited federal common law of trusts; that is, Congress made no attempt to legislate a rigid framework of benefits nor was a grid of obligations systematically laid out. Parties are at liberty to draft employee benefit plans as they wish. Additionally, state courts are invited to participate in the process and beneficiaries may bring their claims in either state courts or federal district courts as they wish. In either event, the law which will apply to interpreting the existence and nature of a "benefit" will be largely dictated by the terms of the Trust itself. A poorer candidate for Certiorari could, accordingly, scarcely be imagined.

While it is true that questions of Plan interpretation under ERISA present "federal" questions, so long as argument centers, as here, upon the meaning of plan language, those questions will scarcely ever be significant to any but participants, beneficiaries or fiduciaries of the Trust in question. The determination of the nature of benefits due under the Plan must be derived from the Plan itself, from the Plan definitions of the benefit and its manner of funding, as the Indiana Court of Appeals noted (Pet., p. 8b), *Connolly*

v. *PBGC*, 581 F.2d 729 (6th Cir. 1978). Doubtless, such questions and their proper resolution are of great importance to beneficiaries, such as Mr. Nill. However, Rule 17 requires more of a candidate for certiorari. The language of Rule 17.1(c) requires presentation to this Court of an "important question of federal law . . . "

Only one page of Nill's Petition is dedicated to argument that does not center around the proper interpretation of the specific Essex Plan language. Pages 10 through 14 are reserved for Nill's argument that the Plan set up an "individual account" and that he was entitled at retirement to the amount contained in this account.

Nill has submitted the full opinion of the Indiana Court of Appeals; he has not submitted the full Trust Agreement upon which, in part, the Court of Appeals' opinion was based. However, sufficient reference is made to the Agreement such that this Court may determine from a reading of the Court of Appeals decision, that the correct result obtained below.

III.

CONCLUSION

The Petition for Certiorari, it is submitted, should be denied.

Respectfully submitted,

*ALAN VERPLANCK
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Essex Group, Inc.

**Counsel of Record*

APPENDIX

APPENDIX

STATE OF INDIANA)
) SS:
COUNTY OF ALLEN)

INDIANA BANK AND TRUST COMPANY OF FORT WAYNE, *Plaintiff,*

- VS -

RICHARD G. NILL and ESSEX GROUP, INC., *Defendants.*

In the Allen Superior Court

Cause No. S-77-2042

[Filed Clerk's Office, Robert B. Hayden, Clerk, 1978 Mar 31 AM 10:08 Allen Superior Court]

ANSWER TO AMENDED COMPLAINT

Comes now the defendant, Richard G. Nill, by counsel, and for his Answer to the Plaintiff's Amended Complaint alleges and says:

1. Defendant, Richard G. Nill ("Defendant Nill"), admits the allegations contained in rhetorical paragraph 1 of Plaintiff's Amended Complaint.

2. Defendant Nill admits that Plaintiff executed a form of Pension Plan of Fort Wayne Tool & Die, Inc. ("Fort Wayne"), but said Defendant alleges that Exhibit "A" to Plaintiff's Amended Complaint is not the complete Plan in that said Pension Plan omits certain provisions that were agreed upon by the parties who originally established the said Pension Plan.

3. Defendant Nill admits that Fort Wayne was reorganized into Defendant Essex Group, Inc. ("Defendant Essex"), which succeeded to the duties and responsibilities as the employer under the Pension Plan, but said Defendant also alleges that Defendant Essex is bound by the omitted provisions which were agreed upon by the parties originally establishing the said Plan, since it was or should have been aware of such omitted provisions when it absorbed Fort Wayne.

4. Defendant Nill admits the allegations contained in rhetorical paragraph 4 of Plaintiff's Amended Complaint.

5. Defendant Nill admits that he claims an interest in a portion of the property which the Plaintiff is holding as Trustee under the Pension Plan, but said Defendant is unaware of the specific instructions given to the Plaintiff by Defendant Essex.

6. Defendant Nill admits that a controversy has developed as to the proper construction of the Pension Plan and his entitlement to the benefits thereunder. Said Defendant alleges that the terms of the Pension Plan as originally agreed upon are clear and concise and that Plaintiff and Defendant Essex have wrongfully withheld monies due and owing to Defendant Nill.

WHEREFORE, Defendant Nill prays that Plaintiff take nothing by way of its Amended Complaint, that he be granted judgment on his Answer, including costs, and for all other just and proper relief in the premises.

AFFIRMATIVE DEFENSE AND COUNTERCLAIM

Comes now Defendant Nill, and for his Affirmative Defense and Counterclaim with regard to Plaintiff's Amended Complaint alleges and says that:

1. When said Pension Plan was originally agreed upon by the then President of Fort Wayne and Mr. Lee Mascotte, a copy of which is attached hereto, inconsultant for Fort Wayne, it was to contain the terms and provisions set out in the letter from the said Lee Mascotte, a copy of which is attached hereto, incorporated herein by reference and marked for identification Exhibit "A".

2. As a result of a serviceman's error in reducing the terms set out in Exhibit "A" hereto to writing in a formal plan, the provision entitling a retiring employee to "take the sum accumulated in his account" was omitted. As a result, the form of the plan which is Exhibit "A" to Plaintiff's Amended Complaint makes no provision for the amount in an employee's account in excess of that needed to purchase an annuity for him.

3. At the time Fort Wayne was reorganized into Defendant Essex, Plaintiff and Defendant Essex entered into a written agreement, a copy of which is attached hereto, incorporated herein by reference and marked for identification Exhibit "B", pursuant to the terms of which Plaintiff entered into the employment of Defendant Essex for certain specified considerations including, among others, that he "shall also be entitled to receive all vacations, pension, insurance and other fringe benefits which he has heretofore received from Fort Wayne".

4. Defendant Essex was, or should have been, aware of the provision of the Pension Plan which was accidentally omitted from Exhibit "A" to Plaintiff's Amended Complaint.

5. Upon retiring from the employment of Defendant Essex on June 1, 1976, Defendant Nill gave Plaintiff and Defendant Essex notice, a copy of which is attached hereto, incorporated herein by reference and marked for identification Ehhibit "C", of his election to "take the sum accumulated in his account" as provided for in Exhibit "A" hereto. However, Plaintiff and Defendant Essex have failed and refused to comply with the terms of Exhibit "A" and "B" hereto, despite the demand of Defendant Nill that they do so in that Plaintiff has refused to permit Defendant Nill to "take the sum accumulated in his account" and Defendant Essex has instructed Plaintiff to so refuse, despite the demand of Defendant Nill to be allowed to "take the sum accumulated in his account" upon retiring.

6. Defendant Nill continued in the employment of Fort Wayne and, subsequently, in the employment of Defendant Essex for over fifteen (15) years in reliance upon the representations and belief that the provisions evidenced by Exhibit "A" hereto were in the said Pension Plan.

7. That as a result of the failure of Defendant Essex to comply with the terms of Exhibit "A" hereto, Defendant Nill has sustained extensive monetary damages, in an amount to be determined by this Court, and said Defendant will sustain further monetary damages as a result of the failure of Plaintiff and De-

fendant Essex to comply with the Agreement evidenced by Exhibit "A".

WHEREFORE, defendant Nill prays that this Court order Plaintiff and Defendant Essex to comply with the terms of the Pension Plan Agreement evidenced by Exhibit "A" hereto, or in the alternative, that Plaintiff and Defendant Essex respond in monetary damages equal to the amount in the Pension Plan account of Defendant Nill on the date of his retirement from the employment of Defendant Essex, plus interest thereon until paid, costs of these proceedings, and for all other just and proper relief in the premises.

Respectfully submitted,

LIVINGSTON, DILDINE, HAYNIE & YODER

By /s/ WILLIAM P. FAGAN
William P. Fagan

Attorneys for Defendant
Richard G. Nill

425 Lincoln Bank Tower
Fort Wayne, Indiana 46802
Telephone: (219) 423-9411

CERTIFICATE OF SERVICE

[Omitted in printing]

Exhibit "A"

December 29, 1960

Mr. Richard G. Nill
Fort Wayne Tool Die & Engr.
1025 Goshen
Fort Wayne, Indiana

Re: Proposed Retirement Plan

Dear Dick:

Under the proposed retirement plan for Fort Wayne Tool & Die an employee earning $200 a week or $866 a month would receive the following benefits:

1. Retirement: At the employee's age 65 he would receive an income of $266.40 a month as long as he lives with a guarantee that in any event a minimum of ten years of payments will be made to the employee or his beneficiary.

   Stated in another way, at retirement the employee is guaranteed a life income. If he lives to 85 he will have received $63,936.00.

   Should he die immediately, upon retirement his beneficiaries will receive a minimum of 10 years of payments or $31,968.

   This retirement benefit is in addition to Social Security. The two combined make actual retirement in reasonable comfort possible.

   The present Social Security Act provides an income of $127 a month for an employee earning in excess of $400 a month and an additional

$64 a month for the employee's wife if she is 65 or a total of $191 a month.

The $191 when added to $266.40, under the proposed plan, gives the employee and wife an income of $457.40 a month; a sum sufficient to enjoy the remainder of life in reasonable comfort and security.

2. Death Benefit: Subject to satisfactory evidence of insurability at his entry date into the plan, if the employee dies before his retirement date his beneficiaries will receive $26,640 as a death benefit.

This $26,640 at the employee's election can be paid to his beneficiary in one sum, or in installments, or over the beneficiaries lifetime, or in any other reasonable manner the employee might desire.

Tax Advantages:

The annual deposits to the plan by Fort Wayne Tool and Die are not considered additional compensation to the employee and no tax is paid by the employee until the employee actually receives his benefits.

For the employee to provide the same retirement benefit for himself at 65 he would have to have an income of 130% more than the employer's deposits in order to have the amount after taxes necessary to provide his benefits.

The death benefit is not taxable as income to the beneficiary nor is it taxable as an added asset of his estate for Federal Estate Taxes. However, the em-

ployee must report as additional income the term cost of the death protection (at age 40 the term portion of the death protection is valued at $4.42 per $1,000 or for $26,600, a total of $107.57).

Long Term Capital Gain:

In lieu of all other benefits the employee at retirement may with the employer's consent take the sum accumulated to his account out in one sum; under present Revenue rulings on a long term capital gains tax basis. To provide a monthly income of $266.40 at 65 for 10 years certain and as long as the employee lives, requires an accumulation of $42,560. This is therefore the sum available in lieu of all other benefits.

Vesting:

The plan contemplates a life insurance policy to provide the death benefit and a side fund into which sufficient sums are deposited each year so that at retirement there will be sufficient funds when transferred to the cash value of the life policy the insurance company will have the funds necessary to provide the retirement income to the employee for the remainder of his life.

In the event of termination of employment prior to retirement, the employee receives his life insurance policy as a terminating benefit.

The conversion fund deposits remain in the fund to help fund the retirement liability of those who continue in the plan to retirement.

The terminating employee may continue the life insurance by assuming premium payments or may surrender the policy for its then value.

If you have any questions please call.

Sincerely yours,

Leo C. Mascotte

LCM/mk

Exhibit "B"

EMPLOYMENT AGREEMENT

THIS AGREEMENT dated February 5, 1970, among FORT WAYNE TOOL and DIE, INC. ("Fort Wayne"), ESSEX INTERNATIONAL, INC. ("Essex") and RICHARD G. NILL ("Employee").

WITNESSETH

WHEREAS, Essex has become the sole shareholder of Fort Wayne and in such capacity desires to assure Fort Wayne of the continued services by the Employee (who has served Fort Wayne as President and Chief Executive Officer) to Fort Wayne (or the division of Essex which shall continue the business of Fort Wayne in the event of dissolution of Fort Wayne); and

WHEREAS, Fort Wayne and Essex as successor to the business of Fort Wayne under the circumstances stated are hereinafter referred to as "Employer"; and

WHEREAS, Employee is willing to accept such employment under the terms and conditions hereinafter set out:

NOW, THEREFORE, in consideration of the mutual covenants and promises herein contained, it is agreed as follows:

1. Employee agrees to serve Employer and Employer agrees to employ Employee from the date of this Agreement until May 31, 1976 in the capacity of President and Chief Executive Officer of Fort Wayne, or in a comparable executive capacity in the event of the dissolution of Fort Wayne. Thereafter, Employee's employment shall continue in effect unless either party

gives the other party written notice of intention to terminate, in which event the employment shall terminate thirty (30) days from such notice. For his services, Employee shall receive the sum of $38,000 per year, payable semi-monthly, plus out-of-pocket disbursements in accordance with Essex policy. Employee shall also be entitled to receive all vacations, pension, insurance and other fringe benefits which he has heretofore received from Fort Wayne.

[2/29/70 Walter Probst guaranteed that there was no need to change this agreement to cover the 15,000.00 yearly bonus I am to be paid to offset some fringes I gave up.]

2. In the event of the Employee's death at any time during the term of his employment, either prior or subsequent to May 31, 1976, all payments hereunder shall terminate with the payments for the month in which his death shall occur, and Employer shall thereupon be relieved from any further liability for salary payments under this Agreement.

3. Employee will not disclose to any unauthorized person or use for his benefit, either directly or indirectly, any knowledge and information which he may acquire or have acquired respecting the inventions, designs, methods, systems, formulas, processes, machines, products, compositions, ideas, improvements, trade secrets, customers, sales, customer requirements and usages, records of research, manufacturing costs, drawings, books, accounts, records, correspondence, technical data, methods of doing business, business affairs or other private or confidential matters, information or data of Employer or of any of their predecessor, subsidiary or affiliated companies without

Employer's prior written permission; Employee further agrees that any of the foregoing matters, information or data, whether prepared by him or which have or may come into his possession during his employment are and remain the property of Employer; and when his employment by Employer shall terminate all such matters, information, or data, or the like, including all copies thereof, together with all other property belonging to Employer or used in its business, shall be delivered to or left with Employer.

4. Employee will disclose to Employer all inventions and improvements which he may make during his employment by Employer or within six (6) months after the termination of such employment that may be within the scope of Employer's business at the time of such termination, and on demand he will assign to Employer all of his interest in any such inventions and improvements, executing any papers, and doing any acts which Employer may consider necessary to secure to it or its successors or assigns any and all rights relating to such inventions and improvements, including patents in the United States and foreign countries; provided, however, that Employee shall not be required to incur any expense in discharging his responsibilities under this Paragraph 4.

5. Employee hereby covenants and agrees with Employer not to re-establish, re-open, or in any manner become interested, directly or indirectly, either as an employee, manager, owner, partner, agent, shareholder (except as a shareholder in a listed corporation), director or officer, or otherwise, in any business, trade or occupation the same as, similar or competitive to the business engaged in by Fort Wayne as of the date

hereof within the territorial limits of the states of the United States in which Fort Wayne or Essex, as the successor to the business of Fort Wayne because of such dissolution, manufactures or sells the products manufactured by Fort Wayne as of the date hereof, so long as Fort Wayne, Essex, or their successors in interest carry on a like business for a period of three (3) years from the date of termination of employment.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first above written.

FORT WAYNE TOOL AND DIE, INC.

By /s/ RICHARD G. NILL
(Its President)

Employer

ESSEX INTERNATIONAL, INC.

By /s/ EDWARD D. DOWNING
(Its Vice President-Legal)

/s/RICHARD G. NILL
Richard G. Nill

Employee

Exhibit "C"

June 16, 1976

Indiana Bank & Trust Company, Trustee
Clinton and Washington Streets
Fort Wayne, Indiana 46802

Re: Richard G. Nill

Gentlemen:

Reference is made to the letter to you dated June 15, 1976, from Essex Group, Inc. concerning Mr. Nill's retirement and the Trust Agreement dated April 20, 1961, between you as Trustee and Fort Wayne Tool & Die, Inc.

Please be advised that I represent Mr. Nill. We confirm that his employment was terminated as of May 31, 1976, and that, as of June 1, 1976, he is entitled to retirement benefits under the terms of the above-referenced Trust Agreement.

Notice is hereby given that Mr. Nill elects to accept, as his retirement benefit in full, a lump sum, cash distribution of the amount of money in the auxiliary fund which you are holding in his name and the cash surrender value of the life insurance policy insuring his life. It is our understanding that, as of June 1, 1976, the auxiliary fund which you are holding in his name had, on deposit, One Hundred Six Thousand Three Hundred Eighty-Nine Dollars and Twenty-Two Cents ($106,389.22) and that the cash surrender value of the life insurance policy on his life was Fifty Five Thousand Dollars ($55,000.00). Those amounts total One Hundred Sixty-One Thousand Three Hundred Eighty-Nine Dollars and Twenty-Two Cents ($161,-

389.22). I understand that the employer will not interpose any objection to this distribution although it assumes the position that the final decision with regard to it must be made by you as Trustee.

Mr. Nill requests that you promptly prepare a check payable to his order in the amount of $161,389.22 and advise either he or I when it is ready to be picked up.

If you have any questions or comments concerning this matter, please do not hesitate to contact me.

Very truly yours,

LIVINGSTON, DILDINE, HAYNIE & YODER

By /s/ WILLIAM P. FAGAN
William P. Fagan

WPF/dk
cc: Richard G. Nill
cc: Donald J. Letizia